

NO. 82-1283

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1982

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W. J. ESTELLE, JR.,

Petitioner

VS.

ALBERT H. CARTER,

Respondent

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On Petition For Writ of Certiorari  
To The United States Court of Appeals  
For the Fifth Circuit

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RESPONSE IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES Albert Houston Carter, Respondent herein,  
by and through Arnold Anderson Vickery, who in the courts  
below has been appointed under the Criminal Justice Act to  
prosecute the issues and grounds presented in the Petition  
of the Attorney General of the State of Texas. Albert Houston  
Carter respectfully requests the Court deny the Petition for  
Writ of Certiorari in this cause and as grounds therefor, would

respectfully show the Court the following:

OPINIONS BELOW

The United States District Court of the Southern District of Texas, Houston Division, on June 13, 1980 granted Respondent's Application for Writ of Habeas Corpus, pursuant to the statutory authority granted in 28 U.S.C. 2254. Respondent was released on that date upon the granting of Respondent's Motion for Summary Judgment. Respondent has not been reincarcerated during the pendency of these proceedings. That court's opinion was issued in Carter v. Estelle, 499 F. Supp. 777 (S.D.Tex. 1980). It is accurately reproduced in the Appendix to the Brief for Petitioner. The remainder of the opinions below are accurately cited in the Brief for Petitioner and such statement is adopted.

JURISDICTION

The statement of jurisdiction presented by the brief for Petitioner is correct and is adopted.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statement of these provisions is accurately stated in Brief for Petitioner, and is adopted.

STATEMENT OF THE CASE

Respondent is presently released from custody pursuant to the June 13, 1980, order of the Federal District Court for the Southern District of Texas (McDonald, J.). On that date several motions were urged to that court by both Respondent (then Petitioner) Carter and Petitioner (then Respondent)

W. J. Estelle. The Court denied the State's various motions and granted Carter's Motion for Summary Judgment and ordered his immediate release from custody.

The procedural history of this case is both long and complex. However, it is important to set it forth in some detail to enable this Court to rule on the questions.

For approximately seven years prior to June 13, 1980, Carter was incarcerated pursuant to the judgment and sentence of the 185th Judicial District Court of Harris County, Texas, styled The State of Texas v. Albert H. Carter in Cause No. 178,126, for embezzlement-habitual.

The records reflect that Carter was previously convicted on April 20, 1962, in the United States District Court for the Middle District of Georgia, of the offense of perjury, and also of the offense of felony embezzlement in Cause No. 137,784 on November 4, 1969 in state district court in Houston, Texas. Punishment for the 1969 conviction was subsequently assessed at seven (7) years' confinement in the Texas Department of Corrections. On January 27, 1971, the Texas Court of Criminal Appeals affirmed the conviction on direct appeal. That conviction has been collaterally attacked by habeas corpus in both the state and federal forums and now pends in federal district court, Southern District of Texas, under Cause No. 74-H-1603A.

On September 21, 1972, Carter was tried and convicted in Cause No. 178,126 of the offense of embezzlement. Due



to his two prior felony convictions, he was sentenced as an habitual offender to life imprisonment. On June 5, 1974, the Texas Court of Criminal Appeals, in a written opinion, reversed that conviction on the grounds of insufficient evidence presented by the State to support Carter's conviction. Carter v. State, Tex.Crim.App. 1974, 510 S.W.2d 323. The Court held that because the State had failed to introduce evidence to support the element of ownership in the person in whom ownership was alleged in the indictment, the conviction was invalid. On remand, Carter filed a pro se "Special Plea" in the district court urging double jeopardy as a bar to retrial. The plea was overruled<sup>1</sup> and upon retrial on the identical embezzlement charge, Carter was again convicted and a life sentence imposed. Although Carter took no direct appeal from this conviction and sentence, he filed a motion for new trial, referencing the special plea. A petition for removal to the federal court was denied.

On December 13, 1976, Carter filed a Post-Conviction Petition for Writ of Habeas Corpus in the convicting state district court which ordered an evidentiary hearing set for December 28, 1976. On December 28, 1976, the petition was denied, without evidence. The Court of Criminal Appeals dismissed on February 2, 1977.

On September 21, 1978, Carter filed another Post-

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<sup>1</sup> No docket entries disclose the trial court's disposition of that Plea, so it must be presumed overruled by operation of law.

Conviction Petition for Writ of Habeas Corpus in state court under Cause No. 178,126-B. On October 4, 1978, the State's answers was filed. On October 11, 1978, the petition was denied without relief. On October 18, 1978, the record of proceedings was mailed to the Court of Criminal Appeals. The Court of Criminal Appeals dismissed the petition on January 11, 1979.

Meanwhile, Carter sought habeas relief from the Federal District Court in Cause No. 74-H-1603, Carter v. Estelle. The specific reliance on the Burks v. United States, 437 U.S. 1 (1978) rule was raised in that case by supplemental petition filed on July 19, 1978, by the undersigned counsel. That particular ground had never been raised in any of Carter's collateral or direct attacks on his 1974 conviction. On August 21, 1978, Judge Cowan dismissed 74-H-1603 for lack of exhaustion of state remedies. Case No. 74-H-1603 was a "mixed" petition, however, which involved challenges to: (a) Carter's 1962 and 1969 convictions, for which Carter had then discharged his sentences and exhausted all state remedies, and (b) his 1974 conviction upon retrial under which Carter was serving a life sentence as an habitual offender and for which he had allegedly not exhausted all state remedies. Carter therefore moved the Court to vacate the judgment and bifurcate the case. Thus, on February 8, 1979, Judge Cowan severed 74-H-1603 into two cases designated "A" and "B". Case "B",

the challenge to the 1974 conviction and double jeopardy claim, was dismissed on exhaustion grounds. Case "A" was retained to secure Carter's right and opportunity to challenge his 1969 (7-year) conviction.

Finally, on March 9, 1979, with 74-H-1603-A still pending in federal court, Carter, to rectify his failure to exhaust state remedies for his 1974 conviction and to give the State adequate opportunity to address his double jeopardy claim, filed a Post-Conviction Petition for Writ of Habeas Corpus in the 185th State District Court under Cause No. 178,126C attacking his 1974 conviction and life sentence. The petition urged primarily the double jeopardy claim. In that petition, all grounds other than the double jeopardy claim here in question were represented conditionally, e.g., Carter stated categorically that in the event relief was granted on his primary claim, i.e., that his retrial and reconviction violated double jeopardy, the other grounds incorporated (all pertaining to the validity of the 1974 sentence conviction) were moot. The State answered on April 30, 1979. The petition was denied without relief. The Court of Criminal Appeals dismissed by written order dated November 14, 1979, and summarily denied a motion for reconsideration



January 10, 1980<sup>2</sup>.

Civil Action H-80-433, the case at bar, was filed by Carter on February 29, 1980, seeking a Writ of Habeas Corpus. This appeal lies from Judge McDonald's order of June 13, 1980, granting Carter's Motion for Summary Judgment and directing his immediate release.

The district court's ruling was affirmed by written opinion of the Fifth Circuit in Carter v. Estelle, 677 F.2d 427 (Fifth Cir. 1982). The Fifth Circuit denied Carter's petition for rehearing and suggested rehearing after entertaining briefs on written questions and briefs in support and opposition of the rehearing. Carter v. Estelle, 691 F.2d 777. Both of the Fifth Circuit opinions have been appended by the Appendix to the Brief for the Petitioner. The issues before the two lower courts were dual, and one has apparently been abandoned

2 In pertinent part, the rationale offered by the Court of Criminal Appeals in denying relief follows:

In his present application, Carter admits that he has an application for writ of habeas corpus pending in the United States District Court for the Southern District of Texas, Houston Division, in an action styled Albert H. Carter v. W. J. Estelle, Jr., Civil Action No. 74-H-1603.

In Ex parte Green, Tex.Crim.App. 1977, 548 S.W.2d 914, this court stated: "A petitioner must decide which forum he will proceed in because this court will not and the trial court in this state should not consider a petitioner's application so long as the federal courts retain jurisdiction of the same matter. Ex parte Powers, Tex.Crim.App. 487 S.W.2d 101 (1972). See also Ex parte McNeal, Tex. Crim.App., 502 S.W.2d 157 (1977).



by the State in its Petition. The issue which has been abandoned centered on whether the Respondent had satisfied the requirements of the exhaustion doctrine, to entitle him to habeas corpus relief. The remaining issue is the retroactivity of the Burks v. United States and Greene v. Massey double jeopardy decisions, which bar reprosecutions after reversals of conviction, when the reversal is based on insufficient evidence in the first trial.

#### SUMMARY OF THE ARGUMENT

##### A.

Although this case was joined with Estelle v. Bullard, for argument before the Fifth Circuit, the possible future resolution of Estelle v. Bullard by this Court is irrelevant to the instant cause. Counsel for Petitioner suggests that this Court should defer resolution of this Petition until Estelle v. Bullard is decided on remand, by the Fifth Circuit. See Estelle v. Bullard, \_\_\_ U.S. \_\_\_, 102 S.Ct. 2927, 51 U.S.L.W. 3532 (January 18, 1983). Should this Court ultimately have to decide Bullard on the second issue presented for review, which is whether Burks/Greene and Bullington v. Missouri, are retroactive, this does not necessarily mandate the precise retroactivity question posited by the Petitioner in this cause. See, Estelle v. Bullard, \_\_\_ U.S. \_\_\_, 102 S.Ct. \_\_\_, 50 U.S.L.W. 3982 (June 15, 1982), citing Burks v. United States, 437 U.S. 1 (1978), Greene v. Massey, 437 U.S. 19 (1978) and Bullington v. Missouri, 451 U.S.

430, 101 S.Ct. 1852, 68 L.Ed. 270 (1981).

B.

The retroactivity of Burks v. United States, and Greene v. Massey, were a prerequisite to the holding of the court below that habeas corpus relief was properly granted by the District Court. It is undisputed that the facts presented by this case and its procedural posture fit squarely within the Burks/Greene doctrine, if it is to be applied. While several arguments have been variously advanced before the Courts below by the Petitioner to support the inapplicability of Burks/Greene to the case at bar, those grounds have apparently been abandoned in this Petition. Such grounds were that the evidence found to have been insufficient in the case at bar somehow was not "insufficient evidence for purposes of Burks/Greene", that the evidence was not found to be insufficient, and that federal courts had a duty and a right to examine the evidence presented in a state court trial proceeding to determine insufficiency for purposes of a Burks/Greene determination according to the reasonable doubt standard in Jackson v. Virginia, 1979, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573. The Petitioner now bases his entire argument for prospective-only application of Burks/Greene on detrimental reliance. The Petition would have this Court find as a matter of law that the character of reliance at the state court level was such that to avoid penalizing prosecutors for failing to adduce all evidence at the first

trial of Respondents such as Mr. Carter, this Court should leave unredressed violations of two of the most basic rights in Anglo-American jurisprudence. The application of Robinson v. Neil, 409 U.S. 505, 93 S.Ct. 876, 35 L.Ed.2d 29 (1972), indicates that when a double jeopardy decision has as its foundation a fundamental right of Anglo-American jurisprudence, retrospectivity of that decision should be afforded. The two most fundamental doctrines in Anglo-American jurisprudence are at issue in the Burks/Greene decisions, and mandate the retrospective application of those decisions, as many courts have held. These two doctrines are that no person may be convicted except on evidence strong enough to convince the factfinder of the commission of each element of the crime charged; and, once acquitted, no person may be again tried for the same crime.

C.

While the decision in Robinson v. Neil was crafted by the Justices of this Court to allow for its application to a broad number of Constitutional cases, some of which necessarily would be decided in the future, the decisional factors are carefully stated and need not be amplified by this Court. To do so in this case would be to unduly restrict Robinson v. Neil and render it less useful in the analyzation of the propriety of retrospectivity for future cases as yet undecided.



The issue the Petitioner presents, contrary to the claim of the Petitioner in its argument, is not an important one to the criminal justice system of the State of Texas. Its resolution will not effect the fate of any state prisoners, and the Respondent challenges the Petitioner to prove otherwise. The retroactivity of Burks/Greene, has been decided against the Petitioner for several years in the state Petitioner represents. Because of the peculiar application of the exhaustion doctrine and the entangled procedural posture of this particular case, the State of Texas has had an opportunity to challenge Burks/ Greene in a forum other than the state courts. Therefore, the decision to grant certiorari in this case would be a decision to render an opinion which would be moot as far as the rest of the body of state prisoners in the Texas penal system. Any one of those prisoners can, on facts similar to those present in Mr. Carter's case, obtain relief by habeas corpus before the Texas courts of criminal appellate jurisdiction.

#### REASONS FOR DENYING THE WRIT

##### A.

WHILE ESTELLE V. BULLARD MAY BE DECIDED BY THIS COURT AT SOME TIME IN THE FUTURE, THAT RESOLUTION WILL NOT NECESSARILY DISPOSE OF THE QUESTION PRESENTED HERE.

A case known as Estelle v. Bullard has been posited as containing issues which are dispositive of those in this cause. Estelle v. Bullard is in a procedural position, which



indicates that, in all probability, the Supreme Court will never again review it. It has been remanded to the Fifth Circuit to determine whether independent state grounds exist for granting the relief that Bullard sought and won at the Fifth Circuit level so that the federal courts may avoid deciding the Constitutional issues presented. From a review of this Court's opinion remanding that cause, it is apparent that adequate state grounds, in all probability, do exist, which will require no further review by this Court. However, should this Court ultimately have to decide Bullard on the second issue presented for review in that cause, which is whether the cases of Burks/Greene and Bullington v. Missouri are retroactive in their application, it may very well be that the Court may decide the cause on the retroactivity of Bullington and never reach the issue of whether Burks and Greene are retroactive. The issue in Bullington, which is central to resolution of Estelle v. Bullard is whether Burks/Greene is applicable to prohibit the relitigation in a sentencing phase trial of the issues necessary for the death penalty, once the State has already failed to adduce sufficient evidence at the first such trial. While Bullard and Carter were joined for oral argument before the Fifth Circuit, the logic in such joinder does not mandate similar joinder before this Court. While the Burks/Greene determination may never be made in Bullard's case, the Bullington determination almost certainly will be. This may or may not dispose of

the question presented by the State in the instant petition.

B.

THE DECISIONAL LAW ACROSS THE UNITED STATES HAS UNIFORMLY HELD BURKS V. UNITED STATES AND GREENE V. MASSEY TO BE RETROACTIVE IN ITS APPLICATION TO CASES SUCH AS THAT PRESENTED BY THE STATE OF TEXAS IN THE INSTANT PETITION.

While the Fifth Circuit has stated that mere prospectivity of a decision enunciating constitutional rights should be the exception and not the rule, Chapman v. United States, 5th Cir. 1977, 553 F.2d 886, 890, constitutional decisions involving criminal rights pronounced by the Supreme Court are generally subject to the rules for prospectivity and retrospectively determined in Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601, and its progeny. See, Desist v. United States, 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969).

The standard for retroactivity with respect to the announcement of a "new" constitutionally-based rule affecting criminal trials is four-pronged. Brown v. Mitchell, 4th Cir. 1979, 598 F.2d 835. These criteria may be enunciated as follows:

- (1) The purpose to be served by the new rule announced;
- (2) The extent of reliance by law enforcement officials on the old standard;

- (3) The effect of retroactive application on the administration of justice; and

- (4) The inequity that may result from prospective or retrospective application. Ramey v. Hurber, 4th Cir. 1979, 598 F.2d 753, 759-60.

However, in Robinson v. Neil, 409 U.S. 505, 93 S.Ct. 876, 35 L.Ed.2d 29, a case deciding the retroactivity of the "double sovereign" double jeopardy prohibition pronounced by the Fifth Circuit Court of Appeals in Waller v. Florida, 397 U.S. 387, 90 S.Ct. 1184, 25 L.Ed.2d 435 (1970), the Supreme Court carefully examined the applicability of the Linkletter-Desist standard to that double jeopardy decision specifically, and to double jeopardy decisions in general. Noting that Linkletter dealt with retrospectivity of procedural guarantee decisions of the court, the Robinson court distinguished Linkletter as inapplicable to the double jeopardy safeguard because "procedural" decisions essentially ensure fairness in the trial process, while the double jeopardy clause of the Fifth Amendment proscribed trial ab initio. Robinson v. Neil, 409 U.S. at 508-9, 93 S.Ct. at 878, 35 L.Ed.2d at 32-33. The Robinson court clearly relied upon the seminal double jeopardy decision of Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), which has been retroactively applied without reference to Linkletter, in its decision on the retrospectivity of Waller<sup>19</sup>. Robinson v. Neil, 499 U.S. at 506, 93 S.Ct. at 877, 35 L.Ed.2d at 31. The spectre of detriment flowing from state reliance upon the law of double jeopardy as it existed prior to Waller, while thoroughly explored by

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<sup>19</sup> In his discussion of Benton v. Maryland's guarantee of the enforceability of the double jeopardy clause against the states, Judge Stewart declared that the retroactivity of that decision was established by its application



the Court, was simply not a deterrent to the Court in its decision to implement Waller on a retrospective basis.<sup>20</sup> It clearly relegated the reliance criteria to a position of much less weight than the purpose of the rule asserted to be retroactively applicable.

The Robinson retrospectivity test does not supplant that laid down by Linkletter; rather, they complement one another, and together provide a complete background against which one may, with care, gauge the retroactivity of important substantive and procedural rights guaranteed under the first eight amendments of the Constitution. Where a particular

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application to another of the Supreme Court's decisions on that same day. Ashe v. Swenson, 397 U.S. 436, 437 at n. 1, 90 S.Ct. 1189, 1191, 25 L.Ed.2d 469, 472. The writer observes that a similar but more pronounced stamp of retroactivity arises from the Supreme Court decisions in Greene v. Massey and McArthur v. Nourse, directly applying the Burks decision and handed down on June 14, 1978, and June 26, 1978, respectively. Since the effect of Benton v. Maryland was to apply the full panoply of the Constitution's prohibition against double jeopardy to the several states, and Greene was thus unnecessary for that purpose, the purpose for the decision on state grounds should be viewed as twofold: (1) illustration of the distinction between appellate reversals based on trial error and insufficiency of the evidence; and (2) an affirmative demonstration that Burks v. United States was to be applied retroactively. Robinson v. Neil, 409 U.S. 505, 508, 93 S.Ct. 876, 35 L.Ed.2d 33 (1973).

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Robinson v. Neil, 409 U.S. 505, 508, 93 S.Ct. 876, 877-78, 35 L.Ed.2d 29, 33.



constitutional right assures parity in the gathering and use of evidence or on particular methods of trial, the Linkletter criteria clearly apply. When such a procedural right secures the "very integrity of the fact-finding process" or bears on the guilt or innocence of the accused, Linkletter also applies, and generally accords retrospective effect. Cf., White v. Maggio, 5th Cir. 1977, 556 F.2d 1354. When, however, the courts must decide the retroactivity, a substantive constitutional right, the deprivation of which will inevitably taint the basic fairness of any trial, no matter how carefully conducted, Robinson requires the lower court to restore that right to the one deprived and undo the harm done, unless the policy interests of the state are so overwhelming in relation to the interest sought to be protected that they must take precedence and cannot be protected by any less restrictive means. Linkletter at 629-30, 85 S.Ct. at 737-38, 14 L.Ed.2d at 608-9; Desist at 251-54 and n. 24, 89 S.Ct. at 1034-36, 22 L.Ed.2d at 256-58; Robinson at 509-10, 93 S.Ct. at 878-79, 35 L.Ed.2d at 33; Blackburn v. Cross, 5th Cir. 1975, 510 F.2d 1014, 1017-18, n. 2, rehearing denied 517 F.2d 464.

In the application of both tests, the policy interests of both the government and the defendant as described in the Linkletter criteria, are to be included in the scope of the court's decision process. It is in the weight accorded to each of those interests that subtle shifts are to be found in the breadth of the scope through which courts are directed to view requests for retroactive application of a constitutional

right. Prior decisions on retroactivity indicate that the court's most expanded scope, affording equal weight to each of the Linkletter criteria, is applied where the right bears least on the fundamental fairness of the conviction process. Then the courts can and should consider the equities, the reliance of lawmen and prosecutors on old law, the smooth administration of the judicial system, as well as the purpose of the rule. But the courts must jealously guard those substantive rights which form the framework of our criminal justice system by contracting the scope of its decision to focus almost entirely on the purpose of the rule which guarantees those rights. When faced with a question of retroactive application to redress the deprivation of such a right, the former criteria pale in significance and those rights remain inviolate.

Cases discussing the issue of the retroactivity of the Burks decision reveal that those courts adhere to this analysis and that having considered the purposes of Burks, find those purposes to have clearly favored retroactive application. In United States v. Bodey, the court held Burks retroactive under Robinson v. Neil, citing discussion in which the Supreme Court distinguished Linkletter from application in cases where the purposes of new rights enunciated in a constitutional decision bear upon a defendant's double jeopardy rights. United States v. Bodey, 6th Cir. 1979, 607 F.2d 265,

268, citing Robinson v. Neil, 409 U.S. 505, 93 S.Ct. 876, 35 L.Ed.2d 29 (1973). The Texas Court of Criminal Appeals has, virtually since the date of the Burks decision, recognized the dignity of the purposes behind that rule to afford it retroactive application in a plethora of cases,<sup>21</sup> most notably, Ex parte Reynolds, the pertinent reasoning of which was expressly adopted by the court below. Carter v. Estelle. S.D. Tex. [Houston] 499 F.Supp. 777, 786, (1980), citing Ex parte Reynolds, Tex.Crim.App., 588 S.W.2d 900, 902-4 (1979).

The retroactivity analysis here urged is further confirmed on comparison with that apparent in decisions regarding the retroactivity of various double jeopardy decisions other than Burks.

In Blackburn v. Cross, Judge Morgan wrote for the Fifth Circuit on the issue of the retroactivity of Wingate v. Wainwright, 5th Cir. 1972, 464 F.2d 209, a double jeopardy decision expanding the collateral estoppel (or "same issue") protection of Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), to bar the evidentiary use at trial of former charges of which a defendant has been acquitted. The court stated that Wingate forbade use of that which could "influence the fact-finding system," and thus was to be retroactively applied to invalidate Blackburn's conviction.

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<sup>21</sup> Cf., Ex parte Colunga, Tex.Crim.App. 1979, 587 S.W.2d 426; Ex parte Dixon, Tex.Crim.App., 583 S.W.2d 793; Ex parte Mixon, Tex.Crim.App. 1979, 583 S.W.2d 378, en banc; Ex parte Duran, Tex.Crim.App., 581 S.W.2d 683; and Ex parte Moore, Tex.Crim.App. 1979, 579 S.W.2d 475.



Blackburn v. Cross, 5th Cir. 1975, 510 F.2d 1014, 1019. The purpose of the rule was the only criterion examined by Judge Morgan and no effect was given to reliance by the government on pre-Wingate rules.

The Fifth Circuit approached, but did not decide, a similar issue in United States v. Opager, 5th Cir. 1980, 616 F.2d 231. In that case, although it was unnecessary to reach the government's claim that Burks applied, the Court discussed its substantive application on the apparent assumption that it was retroactive. Id. at 235-36.

Appellant cites the Court to four retroactivity decisions from other circuits: Mizell v. New York, 2nd Cir. 1978, 586 F.2d 942, cert. denied, 432 U.S. 910; Jackson v. Justices of the Superior Court of Mass., 1st Cir. 1976, 549 F.2d 215, cert. denied, 430 U.S. 975; United States v. Rumpf, 10th Cir. 1978, 576 F.2d 818, cert. denied, 439 U.S. 893. Although two of these cases hold a double jeopardy decision to be retroactive and two do not, "scorecard" analysis is inaccurate and misleading here.

Examination and comparison of those cases clearly illustrates the analytic principle which guides these decisions on the retroactivity of double jeopardy rules: that only when the purpose of the rule fails to indicate that retroactivity is proper will the court broaden the scope of its inquiry to include the secondary weight factor of reliance. Mizell at 947; Holt at 1063, 1064, Jackson at 218-19; and Rumpf at 821.



The Court in Burks announced a double jeopardy rule based on two of the oldest doctrines in Anglo-American jurisprudence: (1) no person may be convicted except on evidence strong enough to convince the factfinder that each element of the crime charge was committed; and (2) once acquitted, no person may be again tried for the same crime. As the Robinson Court recognized<sup>22</sup>, such rules have as their purpose man's basic desires for liberty, for only on the strongest evidence can free men incarcerate one another and, if such evidence is not produced, they will not subject the accused to the personal strain, public embarrassment, and expense of a second criminal trial. See, Abney v. United States, 431 U.S. 651, 661, 97 S.Ct. 2034, 2041, 52 L.Ed.2d 651, 661, (1977) citing, Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199.

These two constitutional rules are inextricably connected with the factfinding process and, where their retroactivity is urged, must be the object of the narrowest scope and scrutiny by the court, so that the greatest emphasis may be properly placed upon the purpose of these rules.

When the purposes of the Burks rule are thus placed in proper perspective, vis-a-vis those decisional factors which must remain secondary to this Court's decision on retroactivity, those purposes clearly require that this Court hold with the

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<sup>22</sup> Robinson v. Neil, 1973, 409 U.S. 505, 509, 93 S.Ct. 876, 878; 35 L.Ed.2d 29

Robinson court, that, while it will not wholly disregard the touted detriment flowing to the State of Texas, it will never elevate this detriment above such basic and substantive rights, the benefit of which Respondent has been deprived during his seven years of incarceration on a charge of which he was, in the eyes of the law, acquitted.

C.

DECISION BY THIS COURT OF THE ISSUE PRESENTED  
BY THE STATE OF TEXAS IS UNNECESSARY.

The issue presented by the State of Texas is not an important one to the criminal justice system of the State of Texas, although it may be an important issue in the decision of many states other than that represented by the Petitioner. For several years, the State of Texas has routinely applied Burks/Greene on a retroactive basis, with little or no difficulty. Petitioner states that it cannot know precisely the numbers of convictions that may eventually be invalidated by the holding of the Court of Appeals in this case. The Court of Appeals holding on the issue of the retrospectivity of Burks/Greene will have no effect in Texas, because Texas has had a similar rule since its decision in Ex parte Reynolds, Tex.Crim.App., 588 S.W.2d 900 (1979). This case discussed the application of Robinson v. Neil on retrospectivity and double jeopardy questions and was possessed of sound enough reasoning to have been adopted by the trial court as part of its opinion. Carter v Estelle, S.D. Tex. [Houston] 1980, 499 F.Supp. 777, thus, few or no prisoners in the Texas penal

system will be effected by the Court of Appeals decision, unless the procedural facts of their case are such that they must resort to relief on the federal level.

Robinson v. Neil, 409 U.S. 505 (1973), is a well reasoned decision, which was accurately viewed by its authors on this Court as necessarily broad. The decision was written at a time when burgeoning criminal defense theories were pointing out the routine violations of double jeopardy rights in the machinery of criminal jurisprudence. The decision was crafted to be broad enough to apply to the variety of fact situations which might be presented by the criminal procedures of forty-nine states other than that before the Court. The Petitioner invites this Court to rewrite and interpret Robinson v. Neil. To do so within the confines of Mr. Carter's case, with its twisted procedural history, would be to render a decision which would be so specific to Mr. Carter's case as to be merely confusing when construed with Robinson v. Neil. Thus, while this case may be important to the Texas Attorney General's Office, it is not, even were the retroactivity of Burks/Greene in question among the various circuits, a useful vehicle for providing an interpretation of Robinson v. Neil.




CONCLUSION

For the reasons pressed in this Petition, Respondent respectfully prays that the Petition for Certiorari not be held in abeyance until resolution of Bullard v. Estelle in the United States Court of Appeals for the Fifth Circuit, that the Petition be denied outright, and that the judgment of the Court of Appeals be affirmed in all respects.

Respectfully submitted,

VICKERY & WEBB

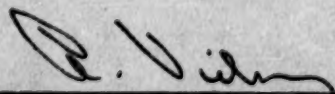
By

  
ARNOLD ANDERSON VICKERY  
5615 Kirby Drive, Suite 700  
Houston, Texas 77005  
(713) 526-1100

Attorneys for Respondent  
Albert Houston Carter

CERTIFICATE OF SERVICE

I, Arnold Anderson Vickery, attorney for Respondent do hereby certify that a true and correct copy of the above and foregoing Response in Opposition to Petition for Writ of Certiorari has been served by placing same in the United States Mail, postage prepaid, certified, return receipt requested, on this the 4th day of March, 1983, to Mr. Douglas M. Becker, Assistant Attorney General, P. O. Box 12548, Capitol Station, Austin, Texas 78711.

  
ARNOLD ANDERSON VICKERY

IN THE SUPREME COURT  
OF THE UNITED STATES

W. J. ESTELLE, JR.  
Petitioner

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§

V.

NO. 252-3025

ALBERT H. CARTER,  
Respondent

§20:1166 MOTION -- FOR LEAVE TO  
PROCEED ON APPEAL IN FORMA PAUPERIS;  
~~REQUESTING APPOINTMENT OF COUNSEL~~  
~~AND PREPARATION OF TRANSCRIPT AT GOVERNMENT EXPENSE~~  
[18 USCS §3006A; 28 USCS §§ 753(f), 1915; FRAP 24(a)]

On January 28, 1983, petitioner, The State of Texas, filed a petition for writ of certiorari to the Supreme Court of the United States from the order affirming the issuance of a writ of habeas corpus entered in this case on August 12, 1980.

Counsel for Respondent, appointed under the Criminal Justice Act to represent the Respondent by the U. S. Magistrate at the District Court level and by the Fifth Circuit at the appellate level, moves the court pursuant to Rule 24(a) of the Federal Rules of Appellate Procedure for an order:

1. Extending the grant of leave to respondent to proceed on appeal in forma pauperis without prepayment of fees or costs or giving security therefor, under the provisions of 28 USC § 1915;
2. Continuing the appointment of counsel to represent respondent on certiorari under the provisions of 18 USC § 3006A; and

3. Directing the reporter to prepare a transcript of the proceedings in this cause at government expense under the provisions of 28 USC § 753(f).

This motion incorporates the affidavit of respondent which was tendered to the Courts below in support of the original appointment of the undersigned counsel to Respondent's claims.

Respectfully submitted,

VICKERY & WEBB

BY: 

ARNOLD ANDERSON VICKERY

Texas Bar No. 20571800

5615 Kirby Drive, Suite 700

Houston, Texas 77005

(713) 526-1100

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the attached Motion was served on all counsel of record by certified mail, return receipt requested on this 21 day of March, 1983.

  
ARNOLD ANDERSON VICKERY



IN THE SUPREME COURT  
OF THE UNITED STATES

W. J. ESTELLE, JR.  
Petitioner

§  
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V.

NO. 252-3025

ALBERT H. CARTER,  
Respondent

§20:1167 ORDER - BY SUPREME COURT - GRANTING  
LEAVE TO PROCEED ON APPEAL IN FORMA PAUPERIS,  
AND APPOINTING COUNSEL AND DIRECTING PREPARATION  
OF TRANSCRIPT AT GOVERNMENT EXPENSE  
[18 USCS § 3006A; 28 USCS §§ 753(f), 1915; FRAP 24(a)]

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The motion of respondent for an order granting leave to proceed in forma pauperis from the response to petition for certiorari of the above-entitled court entered on January 28, 1983, having come on for hearing this day; and the court being fully advised, and good cause appearing therefor,

IT IS ORDERED that defendant be, and he hereby is, permitted to proceed on response to certiorari in this matter in forma pauperis, without prepayment of fees and costs of this court or of the Court of Appeals for the Fifth Circuit, and without giving security for such fees and costs.

FURTHER ORDERED that a transcript of proceedings of the Court for inclusion in the record on certiorari be prepared for the use of the respondent, to be paid for by the United States under the provisions of 18 USC §3006A and 28 USC §753(f).

FURTHER ORDERED that Arnold Anderson Vickery is appointed  
counsel to prosecute this response.

Dated \_\_\_\_\_, 1983.

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JUDGE PRESIDING